

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Sacramento)

MICHAEL D. BEDFORD,

Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO
COUNTY,

Respondent;

SABRINA A. MOTOS,

Real Party in Interest.

C087970

(Super. Ct. No. 09FL05816)

We issue a peremptory writ in the first instance because Superior Court of Sacramento County (Respondent) erroneously issued a modification order changing physical custody of the minor to the noncustodial parent without an evidentiary hearing,

without requiring the noncustodial parent to demonstrate a change in circumstances, and without considering the requisite factors in ordering a change of custody.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2002 petitioner Michael D. Bedford (father) and real party in interest Sabrina A. Motos (mother) stipulated that Michael was the father of a son born to Sabrina in March 2001.

In 2009 the Yuba County Superior Court ordered the parents to share joint legal and physical custody of the minor, but set the minor's primary residence with father and outlined a parenting schedule for mother. The matter was subsequently transferred to Respondent.

By 2010 the minor was living in Rhode Island with father.

In 2014 the parties litigated the issue of visitation. Respondent noted the existing order gave father primary physical custody of the minor. Respondent issued orders regarding, among other things, the holiday schedule, transportation, exchanges, and phone calls between the minor and both parents. Respondent also ruled that "[a]ll other existing, non-conflicting orders involving custody and visitation of [the minor] remain in full force and effect; . . ."

In July 2018 father moved Respondent for an order enforcing the date on which mother was to return the minor to father at the end of her parenting time. Mother said she was encouraging the minor to return to his father, but he did not want to return. Respondent ordered the minor returned to father on August 6, 2018.

The minor was not returned to father and on August 9, 2018, mother filed a petition asking Respondent to modify the existing custody order to grant her primary physical custody of the parties' now 17½-year-old son. Mother claimed the minor, who was entering his senior year in high school, did not want to return to Rhode Island; rather, he wanted to finish high school in California.

Following a hearing on mother's petition, Respondent entered an order finding father had "sole custody of the [minor] at this time pursuant to prior court order." Respondent ordered mother to return the minor to father that day.

Days later, mother filed another petition asking Respondent to modify the existing custody order to move the minor to California and give her primary physical custody. Father opposed her request.

On August 31, 2018, Respondent spoke with the minor on the telephone in "open court." Counsel asked the minor some questions, including what his plans were for his senior year and beyond. The minor said it was his first day of school in Rhode Island; he planned to join the Army after graduation. In a "passive manner," the minor said he would like to spend time with his mother and siblings before being " 'shipped off,' " but was not sure where he would attend school if he moved to California.

Respondent was "satisfied that the minor's testimony was genuine and honest. The minor testified that he would like to be in California for his last year of high school." Respondent then ordered the minor "be enrolled and attend the high school near his mother's residence in Visalia, CA" over father's objection.

Father filed notice of the mandatory 30-day stay for out-of-state move-away orders in Code of Civil Procedure section 917.7. Respondent stayed immediate removal of the minor from father's custody in Rhode Island.

Father filed a timely petition for writ of mandate and a request for an immediate stay of Respondent's August 31, 2018 move-away order.

We issued an alternative writ of mandate and stayed the proceedings in the trial court. Mother expressly declined to file a written return and noted the trial set for January 25, 2019, would be "dropped without prejudice" to either party.

II

DISCUSSION

“Respondent court has discretion to modify an existing custody order based on changed circumstances, or to grant or deny a move-away request. [Citation.] This discretion may be abused by applying improper criteria or by making incorrect legal assumptions.” (*Jane J. v. Superior Court* (2015) 237 Cal.App.4th 894, 901.)

A noncustodial parent bears the initial burden of showing a change in circumstances affecting the minor in order to modify an existing custody order. (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1088-1089; *Jane J. v. Superior Court*, *supra*, 237 Cal.App.4th at p. 902.) A noncustodial parent seeking to move a child out of state must also demonstrate the move will not be detrimental to the child. (*Jane J.*, at p. 904, citing *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 35.)

It is undisputed that father has been the minor’s custodial parent since 2009 and mother the noncustodial parent. It also is evident that Respondent precipitously changed custody from father to mother without an evidentiary hearing and without considering any of the factors required to demonstrate changed circumstances affecting the minor. Instead, Respondent modified the existing custody order based solely on the minor’s “passive” statement that he would like to spend time with mother before being “ ‘shipped off’ ” to the Army. This was an abuse of the Respondent’s discretion.

III

DISPOSITION

Let a peremptory writ of mandate in the first instance issue directing Respondent to vacate its August 31, 2018 order in Sacramento County Superior Court case No. 09FL05816, granting mother physical custody of the minor child and requiring the child move from Rhode Island where father resides to California where mother resides. The temporary stay issued by this court on September 27, 2018, shall be lifted upon finality of this opinion as to this court.

The parties shall bear their own costs in conjunction with this writ proceeding.
(Cal. Rules of Court, rule 8.493(a)(1)(B).)

RAYE, P.J.

We concur:

ROBIE, J.

RENNER, J.